OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 87-3 8 May 1987

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Cases Involving the Obligation to Arbitrate Under a Lawfully Implemented Offer

This memorandum addresses recurring issues regarding whether employers and unions are obligated to arbitrate grievances after a contract has expired, the parties have reached an impasse in negotiations, and the employer has lawfully implemented its final proposal.

The courts and the Board have stressed repeatedly that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 1/

In Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977), the Court held that the termination of a collective-bargaining agreement does not automatically extinguish a party's duty to arbitrate grievances that arose under that agreement. Rather, "where the dispute is over a provision of the expired agreement, the presumption favoring arbitrability must be negated expressly or by clear implication." 2/ In American Sink Top & Cabinet Co., 242 NLRB 408 (1979), the Board relied upon the principles of Nolde Bros. to find an obligation to arbitrate a grievance concerning a discharge that had occurred after the expiration of a collective-bargaining agreement. In American Sink Top, the Board held that the grievance was at least arguably based on the expired agreement and there was no showing that the parties had intended to terminate the arbitration provisions when the contract

---

1/ United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964); The Hilton-Davis Chemical Co., 185 NLRB 241 (1970).

2/ 430 U.S. at 255.

expired. 3/ Thus, under current Board law, there is a duty to arbitrate any dispute that arguably is based on an expired agreement which contains an arbitration provision, unless there is a showing that the parties intended that such provision would expire with the contract.

There are no Board cases that discuss whether there is a duty to arbitrate after an impasse in negotiations is reached and an employer lawfully implements its final bargaining proposal. However, at that point, the terms and conditions of the old contract no longer exist. Hence, a grievance based solely on conduct occurring after an employer implements its final offer cannot reasonably be said to be based on the expired contract. Thus, in our view, the arbitration clause of the old contract cannot serve as a basis for imposing an obligation to arbitrate such a grievance.

The next issue is whether an arbitration provision in the employer's implemented offer can create an obligation to arbitrate such a grievance. Since this provision is imposed unilaterally, and in view of the consensual nature of arbitration, the implemented offer would not impose a duty to arbitrate. However, if there is evidence that the union, by word or deed, expressly or impliedly agreed to arbitrate disputes under that offer, there would be an obligation to arbitrate. And, there would be a corresponding obligation not to strike as to that dispute. 4/

These views are consistent with positions the General Counsel has taken in recent cases involving these issues. In Dundee Cement Co., Cases 7-CA-23980 and 24135, JD-224-85, we did not file exceptions to the Administrative Law Judge's holding that the employer had not violated Section 8(a)(5) by refusing to implement an arbitration provision even though that provision had been part of its final proposal. We agreed with the ALJ that the employer's obligation to implement an arbitration provision was

---

3/ 242 NLRB at 408. See also Digmor Equipment Co., 261 NLRB 1175 (1982). This issue is again pending before the Board in Indiana & Michigan Electric Co., JD-348-81 (oral argument before the Board held Dec. 6, 1983).

4/ Goya Foods, Inc., 238 NLRB 1465 (1978). If the parties reach an ad hoc agreement to arbitrate a particular dispute, and one party then acts inconsistently with that agreement, a Section 8(a)(5) or 8(b)(3) case involving such conduct should be submitted to Advice.

contingent on agreement with the union, and there was no such agreement.

In Gifford-Hill & Co., 28-CA-8072, JD-(SF)-183-85, the ALJ found no obligation to arbitrate under an implemented offer that had included arbitration. The General Counsel filed exceptions because there was evidence that the Union had adhered consistently to the grievance-arbitration procedures of the implemented provision. Thus, there was evidence of an implied agreement between the parties to arbitrate disputes that arose under the implemented offer. Accordingly, we argued that the employer had violated Section 8(a)(5) by refusing to proceed to arbitration.

Finally, in a recent Advice case, Ideal Basic Industries, Cases 12-CA-12185, 15-CA-10067, 26-CA-11774, 28-CA-8571-2, Advice Memorandum dated 4 March 1987, we authorized the dismissal of Section 8(a)(5) charges alleging that the employer had unlawfully modified its implemented final proposal by refusing to arbitrate grievances that arose under that offer. In that case, there was affirmative evidence that the union had not agreed to be bound by the arbitration provisions of the implemented offer and had reserved the right to create ad hoc dispute committees to resolve disputes when it thought that such a procedure would be appropriate. Consequently, there was no mutually agreed-upon arbitration procedure, and the employer lawfully could refuse to arbitrate grievances that arose solely under its implemented offer.

In view of the above, future cases involving these issues should be handled as follows:

If an agreement containing arbitration has expired and the employer has not lawfully implemented its final proposal, cases should be analyzed under Nolde Bros. and American Sink Top as they are now. That is, there would be an obligation to arbitrate grievances that arguably arose under the expired agreement, absent evidence that the parties intended the arbitration provision to terminate with the contract. This would be true even if the employer had lawfully implemented its final offer, if the grievance was based on the old contract.

If a grievance arose after the lawful implementation of a final offer, the terms of which at least arguably cover that grievance, there would be an obligation to arbitrate that dispute only if the parties have expressly or impliedly agreed to arbitration under the implemented offer. To assess whether there has been the requisite agreement, the Regional Offices should determine whether the implemented offer contained an arbitration

provision; whether the employer clearly stated its intention to arbitrate under the implemented offer or whether, to the contrary, there is evidence that, upon implementation or shortly thereafter, the employer denied such an obligation; whether the union agreed to arbitrate under the implemented offer, either expressly or impliedly, e.g., by its consistent actions in invoking arbitration; and whether the union considers itself to be bound by a corresponding prohibition on striking.

If it cannot be established that the parties have mutually agreed to arbitrate disputes under an implemented offer, there would be no obligation to process to arbitration any grievances that arose under the implemented offer. Of course, the parties could agree to do so on an ad hoc basis.

Any issues or questions not addressed by this memorandum should be submitted to the Division of Advice.

Rosemary M. Collyer

Distribution:
Regional - All Professional Employees
Washington - Special
Release to the Public

MEMORANDUM GC 87-3